Supreme Court, U.S.
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NO. 91-1470

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOE E. FRYAR,

PETITIONER

VERSUS

EDWARD C. ABELL, JR.,
AND CAREY WALTON, ET AL,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF JOE E. FRYAR TO THE BRIEF FILED ON BEHALF OF RESPONDENTS

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EDITOR'S NOTE

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Respondents

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully submits this short point-by-point response to the brief filed on behalf of respondents in this matter.

POINT 1:

At page 17, arguing against the timeliness of petitioner's constitutional attack on the RICO statute, respondents

rhetorically assert "six years after commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of the plaintiff, and two and one-half years after the Fifth Circuit affirmed the jury's RICO verdict, Fryar asserted for the first time on remand a constitutional attack on the RICO statute."

But Fryar's trial commenced in December, 1986 and terminated in February, 1987. The conduct involved in that trial commenced in August of 1978 up to the year 1984. The rule of law by which petitioner Fryar's conduct was adjudicated as to the legal issue of "pattern of racketeering activity" contemplated by **18 U.S.C. § 1961(5)** was that as announced and held by the Fifth Circuit in **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985). That rule of law, as exemplified by

R.A.G.S., supra, was that two (2) related acts of mail fraud constituted a "pattern of racketeering activity" without more. Thus, the "pattern of racketeering activity" provision of **18 U.S.C. § 1961(5)**, as interpreted and applied by the Fifth Circuit in **R.A.G.S.**, supra, was not vague and therefore not subject to a constitutional attack for vagueness by petitioner Fryar. Petitioner Fryar's effort to reverse that rule of law after verdict against him was rendered proved futile. **Abell, et al v. Potomac Insurance Company, et al**, 858 F.2d 1104 (5th Cir. 1989) Petitioner Fryar in his petition for certiorari to this Court sought reversal of that rule of law. His application was granted. **Abell, et al v. Potomac Insurance Company, et al**, 109 S. Ct. 3236. That decision was incidental to the Supreme Court's decision in **H.J., Inc. v. Northwestern Bell Telephone**

Company, 492 U.S. 229, 109 S.Ct. 2893 (1989). **H.J.** held that "relatedness" and "continuity" were indispensable components of the "pattern of racketeering activity" contemplated by **18 U.S.C. § 1961(5)**. Petitioner Fryar's case was "remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of **H.J., Inc. v. Northwestern Bell Telephone Company**, supra.

This was the first time that the meaning of "pattern of racketeering activity" as exemplified by **H.J.** was sought to be applied against petitioner Fryar. The Fifth Circuit remanded the **Abell** case to the district court. On that remand, petitioner Fryar then, at the first opportunity available, assailed the constitutionality of the RICO statute as being constitutionally vague as to the meaning of "pattern of racketeering

activity" as held by the Supreme Court in **H.J.** This was the first time that such a rule of law was sought to be applied against petitioner Fryar. Under these peculiar circumstances, his constitutional plea was timely. **Hormel v. Helmarine**, 312 U.S. 552, 61 S.Ct. 719 (1941); **Singleton v. Wulff**, 428 U.S. 106, 96 S.Ct. 2868 (1976).

From an adverse decision rendered by the district court, petitioner appealed to the Fifth Circuit. The Fifth Circuit affirmed holding that the RICO statute was not void for vagueness. **Abell v. Potomac Insurance Company of Illinois**, 946 F.2d 1160 (1991). On rehearing, petitioner Fryar entered a plea asserting that the post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement as exemplified by **H.J.** to petitioner's conduct occurring from 1978 to 1984

constituted an impermissible retroactive application of a substantive change in the law, thereby denying to petitioner his right to due process. Petitioner further complained in that rehearing application that he was denied the right to present evidence and argument to the jury on the issues of "relatedness" and "continuity" which resulted in a denial to petitioner of his right to trial by jury. Thus, all constitutional issues presented to the Court in petitioner Fryar's writ application were timely raised and are properly before the Court for adjudication.

POINT 2:

Respondents at page 17 in their brief essentially argue that because the Court's below made a finding of fact as to petitioner Fryar's alleged "fraudulent conduct", such a finding, being correct,

"should not be reviewed". This but emphasizes petitioner Fryar's claim that he was denied trial by jury as to all of the contending material facts involved in the claims made against him and thus was deprived of his Seventh Amendment right to trial by jury.

POINT 3:

Respondents argue (brief pp. 24-25) that "if Fryar's argument is correct, then the law in effect at the time as enunciated in **R.A.G.S.** must apply. Under **R.A.G.S.**, Fryar's conduct clearly was violative of RICO, as previously found by the Fifth Circuit. **Abell v. Potomac Insurance Company**, 858 F.2d 1104 (5th Cir. 1988). Further review is not required."

Such a proposition makes logic stand on its head. **R.A.G.S.** was found to be not the law. Yet, respondents argue that

petitioner Fryar's application should be judged by **R.A.G.S.** Reduced to its bare essence respondents are requesting this Court to approve of the taking of petitioner Fryar's property through the application of lawlessness. No notion of justice can be more barbaric.

POINT 4:

In their brief at pp. 9-10, respondents, though without relevance to the issues presented in petitioner Fryar's writ application, attack petitioner Fryar's standing before this Court by stating that he is guilty of attempted bribery of the jury trying respondent's claims against Fryar and was also guilty of money laundering. This is but an undisguised attempt to bias the Court against petitioner Fryar. It is as well an implicit invitation to have the Court on that account strip petitioner

Fryar of his constitutional liberty as punishment in addition to the penalty imposed upon him by the Court having jurisdiction over the criminal prosecution of petitioner Fryar. Such an invitation is the quintessence of constitutional obscenity and legal outrage and should be rejected as such.

CONCLUSION

1. The constitutional issues involved in petitioner Fryar's writ application were timely raised and are properly presented for adjudication by the Court.

2. As applied to petitioner's specific conduct, and on its face, the RICO statute is constitutionally infirm due to its vagueness.

3. To retroactively apply the substantive decision of **H.J.** regarding the meaning of "a pattern of racketeering activity" rendered in 1989, to petitioner Fryar's conduct originating in 1978 constitutes the denial to petitioner Fryar of constitutional due process.

4. To permit the Courts below to make a finding of fact as to petitioner Fryar's conduct vis-a-vis the substantive decision of **H.J.** regarding a "pattern of racketeering activity" denies petitioner Fryar of his Seventh Amendment constitutional right to trial by jury.

It is respectfully submitted that for all of the reasons asserted in his writ application and those contained in

this reply brief, petitioner's application should be granted reversing the decision of the Court of Appeal Fifth Circuit.

Respectfully submitted,

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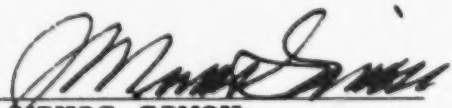
By: 
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